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No. 78-1730

In the Supreme Court of the United States

OCTOBER TERM, 1978

HELEN SMITH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 106-115), the district court's memorandum decision and order (Pet. App. 102-105), and the magistrate's proposed findings of fact and conclusions of law (Pet. App. 1-101) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1979. A petition for rehearing was denied on April 10, 1979 (Pet. App. 116). The petition for a writ of certiorari was filed on May 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had adequate notice at trial that she could be found liable for conversion of certain antique furnishings.

2. Whether alleged defects in the magistrate's proposed findings and allegedly cursory consideration of those findings by the district court and the court of appeals call for the exercise of this Court's power of supervision.

STATEMENT

In 1967 petitioner formed what purported to be an independent interior design and decorating business known as International Interior Designs (IID). At about the same time, she purported to enter into and carry out an agreement to acquire furniture and decorative objects and to sell them to the Westgate California Corporation and its subsidiaries (Westgate) for hotels they planned to build and operate (Pet. App. 4). In fact, petitioner was not an independent seller of antiques to Westgate but was its agent, acting for Westgate in making purchases and committing Westgate's funds for those purchases (*id.* at 46-50). Virtually all of the operating expenses of IID were paid by Westgate and other corporations controlled by C. Arnholt Smith, Westgate's chief executive officer, who became petitioner's husband in 1968 (*id.* at 4, 47). Among the items purchased by petitioner as Westgate's agent were certain furnishings and fixtures sold at a public auction ("the Jean Owings auction") in 1969 (*id.* at 54-55).

In 1973, the United States National Bank in San Diego, California ("the Bank"), of which petitioner's husband was the president and chief executive officer, went into receivership, with respondent Federal Deposit Insurance Corporation named as receiver (Pet. App. 3, 5). A few months later, Westgate went into bankruptcy. The Bank

held a trust deed on the Westgate Plaza Hotel of San Diego ("the Hotel") securing a note on which Westgate had defaulted (*id.* at 1, 5).

The FDIC as receiver brought foreclosure proceedings in 1974 in the United States District Court for the Southern District of California. During the course of those proceedings, it became necessary to determine the ownership of items located, or believed to be located, on the premises of the Hotel, parts of which were then under petitioner's control (Pet. App. 1, 7, 107).[1] The court issued an order to show cause why such a judicial determination should not be made; petitioner was among those served with the order and was a party to subsequent proceedings in the action (*id.* at 1).

The district court referred the issued to a magistrate, who heard 34 days of testimony. Thereafter, the magistrate issued proposed findings of fact and conclusions of law, resolving ownership claims over the disputed items, including those known as "the Jean Owings auction" items. Petitioner had initially claimed that these items had been purchased by her husband with his own funds and that he had given many of them to her as gifts. The magistrate found, however, that the items were actually purchased with Westgate's funds and that they thus belonged to Westgate immediately prior to the time that the Hotel was sold by its receiver to the California Little America Corporation (Pet. App. 54-60). He further found that 23 of the items and parts of seven others had been within petitioner's control but were missing and unaccounted for, that these items had cost

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[1]This action was consolidated with a suit brought against petitioner for unlawful detainer of a penthouse apartment at the Hotel (Pet. App. 1). The suit was brought by FDIC counsel on behalf of the California Little America Corporation, which brought the Hotel after foreclosure under a purchase agreement that obligated the FDIC as receiver to assume responsibility for such litigation.

Westgate $49,766 plus sales tax liability, and that petitioner and her husband were liable to Westgate for the loss it had sustained (*id.* at 60-61). The magistrate also denied many of petitioner's ownership claims as to other items that were not missing (*id.* at 37, 50-54, 61-88) but upheld some of her claims (*id.* at 95-97).

The district court concluded that the magistrate's findings were not clearly erroneous and were supported by substantial evidence. It fully adopted the recommended findings and approved the magistrate's conclusions of law (Pet. App. 102-105) and accordingly entered a judgment against petitioner and in favor of Westgate Hotel Management, Inc., in the amount of $49,766 plus interest, representing the value of the missing items (*id.* at 224-225).

On appeal petitioner argued, *inter alia*, that she had not had adequate notice to defend against a charge of conversion and that entry of the judgment therefore denied her due process. The court of appeals held, however, that the record showed that "it was made clear to [petitioner] that [other parties to the litigation, including the FDIC as receiver of the Bank's assets] were holding her accountable for the missing items" and that "the issues were expanded in this respect" (Pet. App. 114-115). After considering this and numerous other contentions respecting fact findings adopted by the district court, the court of appeals affirmed.

ARGUMENT

1. The court of appeals correctly rejected petitioner's argument (Pet. 15-19) that she had no notice at trial that the status of items to which she had relinquished any claims was in issue and that she might be held accountable for items found missing after having been in her exclusive control. Due process is satisfied where the

party against whom a judgment is entered had actual notice of the issues litigated and resolved, whatever technical defects or omissions there may have been in the formal pleadings. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938); *REA Trucking Company* v. *NLRB*, 439 F. 2d 1065, 1066 (9th Cir. 197) (collecting cases). See also *Bruhn's Freezer Meats of Chicago, Inc.* v. *United States Dept. of Agriculture*, 438 F. 2d 1332, 1342 (8th Cir. 1971). The court of appeals found that petitioner understood that she was being held accountable for the missing items (Pet. App. 115), and that conclusion is supported by the record.

First, in a pre-trial statement filed in the district court, petitioner acknowledged that the proceedings concerned not only her claims to ownership of items apparently located on the premises of the Hotel but also ownership claims by others to property that was located in places under her control (R. 215).[2] Under California law, a party to a replevin action may be found liable for the value of property found to belong to the other party if a return cannot be made. Cal. Civ. Proc. Code §667 (Cum. Supp. 1979). See *Pacific Concrete Products Corp.* v. *Dimmick*, 136 Cal. App. 2d 834, 289 P. 2d 501 (1955).

Second, as petitioner concedes (Pet. 16-18), she was questioned at trial about the location of the missing "Jean Owings auction" items, which she had originally claimed as her own. Contrary to petitioner's suggestion (Pet. 16), the fact that she successfully objected at one point to being questioned about items to which she had relinquished claims does not show that her subsequent answers to questions about missing items specified in a list prepared by the FDIC (Exhibit JJJ) were understood to

[2] "R." refers to the Clerk's Record filed in the court of appeals.

be given merely as aids in locating the items. Before petitioner was asked about the items on the list, counsel discussed the relevance of the list in an off-the-record conversation (Pet. App. 181); later, during questioning, petitioner's counsel made no objection when the magistrate explained to petitioner that counsel for the FDIC was "trying to link you" to certain missing items and suggested that "maybe you've gotten them hidden someplace" (*id.* at 202).

Finally, as to the remark by counsel for the FDIC that, "[w]hen we say 'missing' on this list[,] all we are suggesting is that we have been unable to identify those items" (Pet. App. 184), it is clear from the context that he was merely explaining that, while some items on the list might turn out not to be missing, the compilers of the list had thus far been unable to identify the listed items as furnishings that remained in the Hotel. It thus does not support petitioner's suggestion (Pet. 17) that counsel was describing the limited purpose of the questioning.

2. There is no merit to petitioner's challenge (Pet. 6-15, 20) to the adequacy of the magistrate's fact findings. The magistrate made lengthy and detailed findings and identified the legal bases for his conclusions. The fact that the magistrate found more than one legal basis for denying petitioner's claims to a number of the items (see Pet. 7-8) is hardly a valid objection to those findings. Moreover, petitioner's disagreement with the magistrate's finding of an agency relationship between her and Westgate (Pet. 10-12)—a finding based on the magistrate's interpretation of her agreement with Westgate in light of the way the parties to the agreement actually performed (Pet. App. 21-25, 39-50)—raises purely factual questions that do not merit further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).

Petitioner's related contention that the courts below gave inadequate scrutiny to the magistrate's findings is equally insubstantial. The district court reviewed the magistrate's findings pursuant to the appropriate "clearly erroneous" standard (Fed. R. Civ. P. 53(e)(2)) and adopted those findings after petitioner had availed herself of the opportunity to file objections and to make an oral presentation. The fact that the district court issued its decision after taking three weeks to consider the findings and nine days to consider petitioner's objections does not call for the exercise of this Court's power of supervision, anymore than does the failure of the court of appeals to write an opinion exceeding nine pages in length (see Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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